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August 19, 1996

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VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming
CS Docket No. 96-133

Dear Mr. Caton:

Enclosed for filing please find an original and six copies of the Reply Comments of Tele-TV in the above-captioned matter.

Please date stamp the extra copy and return it to the individual delivering this package. Thank you for your assistance in this matter.

Yours sincerely,

Kevin J. Cameron

Enclosures

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List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status	)	CS Docket No. 96-133
of Competition in the Market for	)	
the Delivery of Video Programming	)	

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AUG 19 1996

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REPLY COMMENTS OF TELE-TV

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August 19, 1996

TABLE OF CONTENTS

SUMMARY

Among the non-dominant video distributors who have filed comments in this proceeding, there is nearly universal agreement that limitations of the Commission's program access rules are a paramount obstacle to effective competition in multichannel video delivery. TELE-TV joins these commenters in urging that the Commission address this situation by recommending changes to current law and by revising its own policies.

The Commission should report to Congress that statutory limitations on the scope of the program access rules greatly undermine their effectiveness. In 1992, Congress focused on a relatively new problem: the development of vertically integrated cable companies that had market power as buyers of video programming, and also controlled programming that competing video distributors needed to enter the market. The goal was to end discriminatory practices that prevented competition from emerging, not to anticipate all the problems that future competitors would face. Now that telephone companies and other serious competitors are entering the multichannel video distribution business, the Commission and Congress should finish the job by removing remaining obstacles to competition.

First, cable companies are not the only ones who control programming that new entrants require to compete. The broadcast networks, DBS providers with programming interests, and other vertically integrated programmers also may have a stake in denying competing new entrants their lifeblood. At the same

time, the market power of major programmers is unconstrained when they deal with new entrants; without buying power of their own, new entrants cannot obtain the same terms that cable operators secure. The result of these factors is that programmers who are exempt from the program access rules are demanding "new entrant premiums" that threaten new competitors' ability to compete.

The Commission should ask Congress to address this problem by extending the reach of the program access rules so that they cover all programmers -- including at a minimum broadcasters and programmers that have an interest in a multichannel video distributor. The Commission also should recommend that Congress close a loophole in the program access rules by extending them to programming that is distributed by terrestrial technologies, not just by satellite.

Nor should the Commission stop there. In addition to seeking congressional action, it should address these emerging problems by commencing a rulemaking to expand the coverage of the program access rules within the limits of current law.

Another problem facing new entrants is that those programmers and cable operators who are subject to the program access rules have little incentive to comply with them. Indeed, TELE-TV's experience suggests that some cable companies have concluded that violating the rules makes good business sense. To cure this situation, the Commission should award damages as a remedy for program access violations and should adopt procedures that speed resolution of program access complaints.

REPLY COMMENTS OF TELE-TV

TELE-TV agrees with those commenters who state that the Commission's program access rules are inadequate to protect and promote competition in multichannel video distribution. The rules do not address anticompetitive practices in a variety of critical areas, including broadcast retransmission consent and the sale of cable programming that is not delivered by satellite.

The Commission should recommend that Congress expand the program access rules to reach all programmers -- including especially broadcasters and vertically integrated programmers -- not just those affiliated with cable or open video system ("OVS") operators. The rules also should reach all programming, however it is delivered. See generally Comments of Ameritech New Media, Inc. at 7-10; Comments of the Wireless Cable Association International, Inc. ("WCAI") at 20-23. Pending congressional action, the Commission should commence a rulemaking to move toward these goals within the boundaries of its existing authority. See Comments of SBC Communications Inc. at 5-6; Comments of BellSouth and BellSouth Telecommunications, Inc. at 4-5.

In addition, the substantive prohibitions of the 1992 Cable Act are not backed by appropriate procedures or penalties. Delay in resolving program access disputes causes particular harm to new entrants, who must obtain rights to key programming before they can even launch their video services. And because violators are not subject to damages liability, innocent competitors bear the entire burden of delay while violators reap rewards from their wrongdoing. The Commission should commence a rulemaking to address this situation as well.

I. THE COMMISSION SHOULD SEEK EXTENSION OF THE PROGRAM ACCESS RULES

The potential for competitive video delivery markets has never been greater. The Telecommunications Act of 1996 removed barriers to telephone company entry into video delivery and affirmatively promoted such entry through its OVS provisions; satellite systems are coming of age; and digital technologies are allowing terrestrial wireless video providers to overcome some of the limitations of that technology.

But these opportunities do not themselves guarantee that competition will flourish. As Congress found in 1992, new entrants can be kept out of the video distribution business by programming vendors who control an essential input to all multichannel video services. "'Without fair and ready access on a consistent, technology-neutral basis, an independent entity . . . cannot sustain itself in the market.'" S. Rep. No. 92, 102d Cong., 1st Sess. 26 (1991) (quoting testimony of National Rural Telecommunications Cooperative ("NRTC")). Even if new entrants could survive in the face of programmers' discriminatory practices, they would not be able to match the offerings of cable operators and could not put strong pressure on the price and quality of cable services.[1]

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[1]See Second Annual Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 11 FCC Rcd 2060, 2124-25 (1995) ("Second Competition Report") (cable subscribers more likely to switch to the services

The 1992 Cable Act addressed this general problem in a specific context: Cable operators were using their ownership of affiliated programmers and their monopsony power as buyers of programming to block new entrants. See S. Rep. No. 92, at 23-29. Congress accordingly required the Commission to promulgate rules focusing on the practices of cable operators and vertically integrated cable operator/programmers. But the problems identified in 1992 comprise only part of the barrier faced by potential new entrants today. Now that telephone companies and other serious rivals to incumbent cable operators are seeking to enter the business, and programmers that are not affiliated with cable operators are themselves becoming multichannel distributors, the limitations of the current program access rules are having serious real-world consequences.

A. The Rules Should Be Extended to All Programmers

One obvious limitation of the current rules is that they do not address discrimination by programmers who are not affiliated with a cable operator. See Communications Act §§ 628(b), (c); 47 C.F.R. §§ 1001, 1002. This omission, however, cannot be justified on the basis that cable-affiliated programmers control all the programming that new entrants need to enter the multichannel video distribution business.

The most important of all television programming is owned by the broadcast networks and their affiliates. Even among cable

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of other distributors in response to a price increase if those distributors offer services comparable to those of cable operator).

subscribers, broadcast programming accounts for about two-thirds of television viewing. Second Competition Report, 11 FCC Rcd at 2114; S. Rep. No. 92, at 35. With the benefits of first entry into the video delivery marketplace and access to free spectrum worth billions of dollars, broadcast networks remain the dominant providers of television programming. They account for nearly half of cable television viewing, and if Fox and UPN are included, the number approaches 60 percent.[2]

Beyond their numerical dominance, the networks control specific programming for which there is no substitute. Seinfeld, the Olympics, and the Superbowl are "appointment television" for which reruns of M*A*S*H, the Battle of the Network Stars, and highlights of the 1995 NFL season are not substitutes. Even broadcast programming to which the networks themselves do not hold rights can be competitively critical; in San Francisco, for instance, KTVU (a Cox-owned television station) holds exclusive rights to show 49ers football games, which are among the most popular televised events in that market. If a new multichannel video distributor ("MVPD") wants to attract viewers in substantial numbers, it must offer this programming.

Certain non-broadcast programming is nearly as vital to a successful multichannel service. The Senate Report that accompanied the 1992 Cable Act noted that the inability of MMDS

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[2]See National Cable Television Association, Cable Television Developments 5 (Spring 1996); First Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 9 FCC Rcd 7442, 7451-52 (1994) ("First Competition Report").

operators to secure access to the "crown jewels" of cable programming precluded them from competing effectively. S. Rep. No. 92, at 14. Even the cable television industry admits that "popular, nationally-distributed" cable services "arguably are vital to the success of MVPD competitors that use alternative technologies."[3] The producers of this programming thus have a power over new MVPDs that is similar to the power held by the networks. ESPN, for instance, is a cable channel that TELE-TV believes it must offer to have an attractive service; it is owned by a broadcasting company, the newly merged Disney/Capital Cities/ABC. Other important channels that are not affiliated with cable operators include USA Network, Lifetime, A&E, and NBC's CNBC.

Because there was almost no competition to cable in 1992, there was no record of dealings between non-cable-affiliated programmers and multichannel distributors who lacked market power. Moreover, there was no reason to think that these programmers would have an interest in disadvantaging new entrants. As long as the programmers were not themselves involved in multichannel distribution, it was assumed that they would welcome new entrants into that market.

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[3] First Competition Report, 9 FCC Rcd at 7531-32 (discussing NCTA comments); see also David Waterman, Vertical Integration and Program Access in the Cable Television Industry, 47 Fed. Comm. L.J. 511, 518 (1995) ("[T]here seems to be a consensus in the industry that the lack of more than one or two of the well-known networks such as ESPN, USA, CNN, and HBO, would seriously handicap a multichannel competitor to an established cable system.").

Yet -- as a number of commenters have observed -- a record of discrimination toward new entrants is developing. If they want to compete head-to-head against incumbent cable operators, these new entrants have no choice but to acquire rights to broadcast signals, the major national cable channels, and other key programming such as regional sports networks.[4] But they lack the "superior bargaining power" that allows major cable operators -- with their millions of subscribers -- to strike favorable deals notwithstanding programmers' strong position.[5] This asymmetry between the bargaining power of new entrants, on the one hand, and cable incumbents and major programmers, on the other, puts new entrants at a formidable disadvantage.

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[4]See generally Declaration of John D. Clark, Jr. (attached hereto as Exh. A) ("Clark Decl."); Declaration of Mindy S. Herman (attached hereto as Exh. B) ("Herman Decl."). DBS providers, for instance, currently cannot offer one category of critical programming -- local broadcast stations -- and consequently have had to focus on a "product differentiation strategy." Second Competition Report, 11 FCC Rcd at 2086-87, 2126. While such differentiated competition is desirable, it is not the sort of head-to-head competition with cable that is needed to break down cable operators' monopolies. See id. at 2125 ("We believe current cable subscribers are more likely to switch to the services of other MVPDs in response to a price increase if those other MVPDs offer bundles of attributes comparable to the attributes offered by the cable operator.").

[5]See First Competition Report, 9 FCC Rcd at 7517 & n.416; see also S. Rep. No. 92, at 45 ("Even for the strongest television stations, it is clear that cable operators with market power can extract some consideration that could not be gained in an effectively competitive marketplace."); Waterman, supra n.3 (discussing empirical evidence that discounts programmers provide to cable operators are not justified by legitimate cost savings or economic benefits).

The Commission has, in its prior reports to Congress, noted the seriousness of this problem.[6] More generally, the antitrust laws governing sales of commodities reflect a congressional recognition that large purchasers may use their buying power to extort special deals unavailable to smaller competitors, driving the smaller competitors from the market. See Robinson-Patman Act, 15 U.S.C. § 13(a) (making it "unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect . . . may be substantially to lessen competition or tend to create a monopoly"); FTC v. Henry Broch & Co., 363 U.S. 166, 174 (1960) (discussing purpose of prohibition).

On top of this emerging problem of unequal bargaining power, Congress certainly did not anticipate that programmers exempt from the program access rules would become vertically integrated media conglomerates with a potential interest in disadvantaging certain new entrants. With the ongoing consolidation of the communications industry, the major non-cable-affiliated programmers increasingly have a stake in competing distribution technologies. For instance, NBC's parent, General Electric, is a partner in the Primestar DBS venture and owns the SMATV provider

[6] See First Competition Report, 9 FCC Rcd at 7517 ("MSOs may have used their programming purchasing power to deter the entry of new cable programmers or competitive alternatives to cable."); id. at 7527 (same); Second Cable Competition Report, 11 FCC Rcd at 2135 ("[S]trategic vertical restraints (achieved by vertical integration, exclusive distribution contracts, or monopsony pressure) can also deter entry into the distribution market . . . .").

GE Capital-Rescom. Fox's effective parent, News Corporation, has joined with MCI to enter the DBS business. Disney, itself a major cable programmer, owns ABC and also has an interest in retail video distribution through Americast.

Whether because cable MSOs have an even greater ability to extract anticompetitive discounts than Congress expected, or because the major non-cable-affiliated programmers are becoming vertically integrated, the problem of discrimination that is outside the scope of the program access rules is acute.

For TELE-TV, the need for equal access to broadcast programming is currently most urgent. The broadcast networks have made a variety of demands in retransmission consent negotiations with TELE-TV that are not made of similarly situated cable operators. These include demands for extra cash compensation, carriage of undesirable network-affiliated cable channels while cable operators are given exclusive rights to desirable channels, and other sorts of non-cash compensation that is not sought from cable operators. See Herman Decl. ¶¶ 5-8.

The broadcasters' demands are reminiscent of the "ridiculously high prices" for cable programming that Congress sought to prohibit in 1992, and they could preclude TELE-TV and its partners from offering a commercially viable video service. 138 Cong. Rec. H6539 (daily ed. July 23, 1992) (statement of Rep. Lancaster); see Herman Decl. ¶¶ 5-9. Some of these demands are so extreme as to be the practical equivalent of a refusal to sell programming. Id. Indeed, they raise the same sort of concerns that the Commission intended to address though its prohibition on exclusive retransmission consent agreements. See 47 C.F.R. § 76.64(m); Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 2965, 3006 (1993).

In addition to such strategies in broadcast retransmission consent negotiations, the networks and other non-cable-affiliated cable programmers are entering into distribution arrangements that will make it difficult for new entrants to gain a foothold. In order to obtain quickly a substantial subscribership, cable programmers exempt from non-discrimination rules are entering into exclusive distribution arrangements with the largest cable MSOs. NBC, for instance, reportedly is giving cable operators exclusive rights to MSNBC for a few pennies per subscriber, thereby preventing other video distributors from obtaining the programming. See Comments of SBC Communications Inc. at 6 & Attachment A (corrected copy filed July 22, 1996); Comments of BellSouth Corporation and BellSouth Telecommunications, Inc. at 4-5.

These exclusive arrangements often are targeted at telephone companies whose entry into video programming threatens both the cable operators and those programmers who have a stake in competing technologies such as DBS.[7] By handicapping telephone

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[7]See Raising the Exclusivity Ante, Cable World at 1, 105 (July 15, 1996) ("Recent exclusive deals have focused on shutting out telcos . . . ."); Cabler Wins Telco Turf War, Daily Variety at 6 (July 9, 1996) ("Many [cable] operators say they'll pass on any network that doesn't offer protection against the telcos.").

companies through such agreements, the cable operators and programmers can limit new competition and protect their current and future positions in video distribution. Consumers, of course, are among the losers, for they will have fewer video distributors to choose from.[8]

To end these discriminatory practices, the reach of the program access rules should be extended to cover all programmers. At a bare minimum, the rules should address the overwhelming market power of broadcasters and the anticompetitive incentives of vertically integrated programmers: It is critical that all broadcasters and all programmers that are vertically integrated with an MVPD be covered.[9] The Commission should so recommend to Congress.

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[8]The Commission recently noted, in the OVS context, the dangers associated with exclusive distribution contracts. It found that these dangers are likely to outweigh any pro-competitive effects and thus adopted a rule against exclusive contracts between cable-affiliated entities for OVS distribution, subject to an exception for contracts that are found to serve the public interest. Second Report and Order, Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems, CS Dkt. No. 96-46, FCC No. 96-249, at ¶¶ 186-94 (rel. June 3, 1996) ("OVS Rulemaking"), recon. denied, Third Report and Order and Second Order on Reconsideration, FCC No. 96-334, at ¶¶ 168-74 (rel. Aug. 8, 1996) ("OVS Reconsideration").

[9]Congress itself has indicated that extending non-discrimination rules beyond the cable industry serves the public interest. Earlier this year it extended the program access rules to OVS, even though there are as yet no existing OVS systems and telephone companies are minor players in video programming and delivery. See Communications Act § 653(c)(1)(A).

B. The Rules Should Apply to All Methods of Programming Delivery

TELE-TV also agrees that there is no logical reason why the rules should be restricted to satellite-delivered programming, when the choice of satellite delivery, as opposed to microwave or cable transmission, does not affect the programmer's incentive or ability to discriminate. See Comments of Residential Communications Network, Inc. at 5-6.

This issue has taken on new urgency in the context of regional sports programming. Regional sports channels are among the most highly valued programming on subscription television. See Clark Decl. ¶ 7. Just as I Love Lucy is no substitute for Seinfeld, moreover, sports events are not fungible. A rabid Baltimore Orioles fan does not want to watch every game played by the St. Louis Cardinals, and certainly will not be satisfied with coverage of beach volleyball.

Cable companies that are bound by the program access rules already control many of the major regional sports networks. There are signs that the cable industry intends to use regional sports as heavy artillery in its battle with new entrants. In Philadelphia, for example, the incumbent cable operator recently secured a controlling interest in the 76ers basketball team, the Flyers (NHL) and Phantoms (AHL) hockey teams, and two sports arenas, and is building a new cable sports channel around these acquisitions. See ComcastSpectacor Transaction Finalized; Partnership Announces Management Team, PR Newswire (July 17, 1996). In Washington, D.C., a joint venture between TCI and Fox has gone after the rights to Bullets, Capitals, and Baltimore Orioles games and intends to set up a new sports channel to carry these contests. HTS Close to Losing TV Rights to Bullets, Caps, Orioles, Washington Post, at D2 (Aug. 1, 1996).

As explained in Part II(A), below, some cable-affiliated programmers are violating the program access rules to prevent TELE-TV from gaining rights to their sports channels. Other regional sports channels are currently exempt from the rules just because they are sent to cable systems by microwave. There also have been persistent industry rumors that some cable companies may switch their sports services to microwave or other terrestrial distribution solely to get out from under the program access rules.

There is simply no rational reason to limit the program access rules to satellite-delivered programming. To close this loophole, the Commission should recommend that Congress revise the 1992 Cable Act to remove all program access limitations that are based on the technology used to deliver programming to MVPDs.

C. The Commission Should Amend its Rules Within the Limits of Current Law

The Commission should not, however, content itself with making recommendations for future Congressional action. In light of the urgency of the problem and the broad statutory mandate issued in 1992, the Commission should commence a rulemaking to expand the program access rules to the extent possible under the Cable Act and the Telecommunications Act of 1996. See generally

OVS Reconsideration, at ¶¶ 168-69 (discussing Commission's power to promulgate additional program access rules).

To effectuate the purposes of section 653 of the Communications Act, for example, the Commission has the power to extend the program access rules to OVS programming vendors and OVS programming providers, regardless of their affiliation with a cable or OVS operator.[10] The Commission likewise can bring the rules up to date by narrowing the exception for non-satellite delivered programming. The Commission could, for instance, clarify that national and regional programming that is delivered by satellite anywhere in the country is satellite programming for purposes of the program access rules, even if it is sent to a particular MVPD by terrestrial means. See OVS Rulemaking at ¶ 198 (deferring consideration of satellite delivery issue).

By exercising its rulemaking powers now, the Commission will take small but significant steps toward leveling the playing field for all multichannel distributors.

II. THE PROGRAM ACCESS RULES SHOULD BE BACKED BY DAMAGES LIABILITY AND IMPROVED PROCEDURES FOR EXPEDITED REVIEW

Regardless of its conclusions regarding extension of the program access rules, however, the Commission should address two

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[10] See Report and Order and Notice of Proposed Rulemaking, Implementation of Section 302 of the Telecommunications Act of 1996, CS Dkt. No. 96-46, FCC No. 96-99, at ¶ 4 (rel. Mar. 11, 1996) (section 653 designed to further "enhanced competition, . . . diversity of programming choices, investment in infrastructure and technology, and increased consumer choice"); United States v. Midwest Video Corp., 406 U.S. 649, 667 (1972) (Commission has authority to regulate "with a view not merely to protect but to promote the objective for which [it] ha[s] been assigned jurisdiction").

deficiencies in its enforcement of the existing rules. The penalties for violations are insufficient to encourage compliance, while delays in processing program access complaints may leave video distributors that are the victims of illegal conduct without any effective recourse. These problems should be corrected so that the efforts of Congress and the Commission to promote video competition will not be undermined.

A. The Commission Should Award Damages in Appropriate Cases

Under the Commission's current approach, an MVPD that has suffered discrimination cannot recover damages for injuries traceable to an unlawful refusal to sell programming or illegal overcharges. TELE-TV agrees with NRTC that the Commission should add to the deterrent effect of the program access rules by making clear that it henceforth will award damages in appropriate cases. See Comments of NRTC at 8-9.

When implementing the 1992 Cable Act, the Commission determined that while it had authority to impose damages liability, doing so probably would not be necessary "to achieve Congress' goal of increasing competition to traditional cable systems by providing greater access by competing multichannel systems to cable programming services."[11] As a result, if a cable-affiliated programmer can drag out negotiations and postpone the filing of a program access complaint, the costs of

[11]Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, 10 FCC Rcd 1902, 1910-11 (1994).

that delay are borne solely by the distributor who is being denied non-discriminatory access to programming. When a program access complaint is not quickly resolved, the costs of the delay likewise fall on the competitor who is being denied programming or is paying unlawfully high rates. The violator, meanwhile, profits.

This may explain why certain programmers and cable operators appear to believe that program access "crimes" do pay. Allegations of program access violations are commonplace where serious competitors have sought to enter the video distribution business. Bartholdi Cable Company, Inc. ("Bartholdi"), for example, alleges that Time Warner long denied it access to the Madison Square Garden Network, causing "significant damage to [Bartholdi's] market entry" as a competitor of Time Warner in New York City. Complaint at ¶¶ 84-87, Bartholdi Cable Co. v. Time Warner, Inc., No. CV-96-2687 (E.D.N.Y. filed May 29, 1996) (appended to Comments of Bartholdi). Bartholdi also notes that the Commission required Time Warner to make Court TV available to Bartholdi, but only "[a]fter a lengthy and costly process in which many potential subscribers were lost." Id. at ¶¶ 88-91. Likewise, OpTel, Inc. indicates that cable-affiliated programmers are attempting to "skirt th[e] rules" and that it recently has been subject to an unlawful refusal to sell satellite cable programming. Comments of Optel, Inc. at 10.

While the Commission has not ruled on all of these disputes, there has been a rash of recent program access complaints, suggesting that some programmers have figured out that a strategy of non-compliance can make the most sense under the Commission's current approach.[12] Moreover, the experiences of Bartholdi and OpTel are consistent with TELE-TV's own problems with programming vendors. As explained in the attached declaration of John Clark (Ex. A hereto), TELE-TV's ability to enter local markets with a competitive programming package has been endangered by the unlawful refusals of some cable-affiliated programmers to sell their programming on nondiscriminatory terms.

Rainbow Programming Holdings, Inc. ("Rainbow"), for example, is a cable-affiliated programmer that distributes satellite-delivered regional sports programming. Rainbow controls such services as SportsChannel New York, Sports Channel New England, and SportsChannel Pacific, all of which have exclusive rights to distribute the games of major home sports teams. TELE-TV simply must have Rainbow's channels if it is to offer a successful video service in markets such as New York, Boston, and the San Francisco Bay area. See Clark Decl. ¶ 7. Yet Rainbow -- having unsuccessfully claimed a right to deny new entrants programming

[12]Commission records indicate that at least eight program access complaints have been filed this year. These complaints cast doubt on the WCAI's suggestion that a "relative paucity of complaints filed with the Commission" demonstrates the general sufficiency of the existing rules. Comments of WCAI at 20. Moreover, victims of program access violations may decide not to file a complaint because the Commission's procedures are unlikely to provide timely and meaningful relief.

notwithstanding the program access rules[13] -- has tried to achieve the same result though obstructionism.

Initially, Rainbow played cat-and-mouse with TELE-TV. By failing to answer letters and telephone calls, letting deadlines slide, and requesting irrelevant or proprietary information from TELE-TV on the pretense that supplying this information would allow negotiations to go forward, Rainbow effectively refused to negotiate with TELE-TV for nearly six months. See Clark Decl. ¶¶ 8-12.

Rainbow only began negotiating when TELE-TV served formal notice that it would file a complaint with the Commission. Id. ¶ 13. Yet Rainbow and its owner, Cablevision Systems Corporation, evidently determined that they could further delay TELE-TV's successful market entry by violating the program access rules in a different way. Rainbow thus attempted to tie its rates for programming to the number of homes passed by TELE-TV's distribution networks. See Clark Decl. ¶¶ 13-14.

Rates based in part on the number of homes passed (rather than just actual subscribers) predictably disadvantage new entrants, who are forced to pay the programmer for subscribers they do not yet have. Indeed, Rainbow has quoted TELE-TV rates under which TELE-TV would pay as much as twice what the incumbent cable operator would pay. Clark Decl. ¶ 14. Rainbow has offered no explanation of how its new rate structure relates to either

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[13]See OVS Reconsideration, at ¶¶ 160-71 (rejecting Rainbow arguments).

Rainbow's costs of providing programming or the economic benefits that accrue to Rainbow from the sale of programming, and it is impossible to see one. See 47 C.F.R. § 76.1002(b)(2), (3); Clark Decl. ¶ 14.

TELE-TV could be forced to sign a contract with Rainbow on discriminatory terms because it cannot wait six months to a year for the resolution of a program access complaint. See Clark Decl. ¶ 13. But this only highlights the inadequacy of current procedures. TELE-TV cannot hope to obtain relief before signing a contract, yet it has no hope of recovering its overpayments to Rainbow even if TELE-TV ultimately prevails in a program access proceeding.

TELE-TV's efforts to obtain access to the programming of Prime Sports West (a TCI affiliate) provide a further example of how the cable industry is disregarding the program access rules. Prime Sports West has denied TELE-TV rights to its satellite-delivered regional sports programming in some areas of Southern California, on the basis that two cable operators, Century Communications Corporation ("Century") and Continental Cablevision ("Continental"), have exclusive subdistribution rights. See Clark Decl. ¶¶ 17-26. Century has refused to sell the programming to TELE-TV, and it appears that Continental will do the same. Yet none of the companies will provide TELE-TV with a copy of a grandfathered subdistribution contract that could support a denial of programming pursuant to section 76.1002(e) of the Commission's rules. Id.

To give yet another illustration, several programmers, including at least one that is subject to the program access rules, have presented TELE-TV with rate cards that distinguish between cable operators, on the one hand, and MMDS and SMATV providers, on the other. The cable-affiliated programmer charges MMDS and SMATV operators as much as 28 percent more than cable operators for the same programming just because of the technologies they use. Such technology-based distinctions are clearly forbidden under the program access rules in the absence of actual cost differences,[14] yet the programmer has not even alleged that any cost differences exist.

TELE-TV already has notified Century and Prime Sports of its intention to file a program access complaint as soon as the Commission's rules allow.[15] TELE-TV also will file complaints against the other programmers if necessary. Yet it should be noted that, were damage awards possible, TELE-TV's disputes with

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[14]See 47 C.F.R. § 76.1002(b)(1), Note 2 (price distinctions based on factors relating to the offering of service may include any "legitimate factors as standardly applied in a technology neutral fashion"); id. § 76.10002(b)(3), Note ("Vendors may use volume-related justifications to establish price differential to the extent that such justifications are made available to similarly situated distributors on a technology-neutral basis"); see also id. § 76.10002(b)(2), Note ("Vendors may base price differentials on cost differences that occur within a given technology as well as between technologies").

[15]Clark Decl. ¶ 23; see 47 C.F.R. § 76.1003(a). OpTel, Inc. is involved in a similar dispute with Century regarding access to Prime Sports West's programming. OpTel also has filed a program access complaint with the Commission. See Program Access Complaint, OpTel, Inc. v. Century Communications, Inc., File No. CSR-4736-P (filed Apr. 9, 1996). That complaint has been fully briefed and is ripe for disposition.

programmers might have been resolved long ago. If a programmer or cable company lacks a legitimate basis for its position, then the near certainty of damages liability might bring it into line. Even where the issue is a close one, a potential violator might want to reach a negotiated agreement or at least try to speed an administrative decision in order to reduce its damages exposure. Yet under the current regime, every incentive is for programmers and cable operators to drag out negotiations and the complaint process as long as possible, secure in the knowledge that delay always favors the program access defendant over the complainant.

The Commission indicated in 1994 that it would revisit its decision not to award damages if "it is brought to our attention that the current processes are not working." 10 FCC Rcd at 1911. The evidence compiled in this proceeding demonstrates that it is time for the Commission to exercise the full remedial authority available under the Communications Act.

B. The Commission Should Revise its Procedures to Comply with the Statutory Mandate of Expedited Review

When it required promulgation of the program access rules, Congress also directed that the Commission "provide for an expedited review of any complaints" filed under those new rules. Communications Act § 628(f)(1). In response, the Commission established a pleading cycle that runs for 50 days and resolved "to keep [additional] pleadings to a minimum to comply with the statutory directive for an expedited adjudicatory process." 47 C.F.R. § 76.1003; Implementation of Sections 12 and 19 of the